81-2398

No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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NANCY D. PERKINS,

Petitioner,

vs.

CATERPILLAR TRACTOR CO.,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

----------*----------

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QUESTION PRESENTED

Whether the Seventh Circuit erred in not adhearing to Fed. Rule Civ. Proc. 52(a) where it decided in a two to one split decision to apply the "left with the definite and firm conviction that a mistake has been committed" test set out in United States v. United States Gypsum Co., 33 U.S. 364, 259 (1948) and decided as a matter of fact that the district court erred in determining that Nancy D. Perkins had proven her case.

TABLE OF CONTENTS

Subject Index

Pages

Opinion Below----------2

Jurisdiction----------2

Statutory Provision Involved----------4

Statement of the Case----------4

Reason for Granting the Writ----------10

Conclusion----------21

Appendix Index

Exhibit A. Opinion of the United States Court of Appeals for the Seventh Circuit----App. 1

Exhibit B Order Denying rehearing in banc----------App. 86

Exhibit C District Court Opinion----------App. 88

Exhibit D Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C.---App. 114

TABLE OF AUTHORITIES

Cases

Pages

Aetna Casualty Co. v. Flowers, 330 U.S. 464 (1947)----------3

Branti v. Finkel, 445 U.S. 507 (1980)----------18

Carr v. Zaja, 283 U.S. 52 (1931)-------3

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)----------18

Pollice v. Hartford Fire Insurance Co., 355 F. 2d 524 (7th Cir. 1965)------17

United States v. United States Gypsum Co., 333 U.S. 364 (1948)----9, 10, 11, 12, 13, 16

Van Ooteghem v. Grey, 628 F. 2d 488 (5th Cir. 1980)----------18, 19

Statutes

Pages

United States Code, Title 28

§ 1254(1)---------- 2

United States Code, Title 28, Fed. Rules Civ. Proc. rule 52(a)------4, 9, 10, 19

United States Code, Title 42

§ 2000e *et seq.*----------4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Nancy D. Perkins, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 28, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is an unpublished per curiam opinion rendered January 28, 1982. A copy of the opinion is included in the Appendix as Exhibit A.

The opinion of the United States District Court is an unpublished opinion entered November 7, 1980. A copy of the opinion is included in the Appendix as Exhibit C.

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JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. A written per curiam opinion was issued by that court on January 28, 1980, with one justice dissenting. The petitioner, Nancy D. Perkins, timely filed a petition for rehearing

and suggestion for rehearing *in banc*. That petition was denied on April 5, 1982 when no judge in active service requested a vote thereon, and with all judges on the original panel voting to deny a rehearing. A copy of the order denying rehearing *in banc* is included in the Appendix as Exhibit B.

The mandate issued but was withdrawn pursuant to petitioner's motion for stay. The mandate reissued June 9, 1982. Even though the mandate has reissued, the United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals for the Seventh Circuit regardless of the status of the mandate. *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 468 (1947).

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STATUTORY PROVISION INVOLVED

Fed. Rules Civ. Proc. rule 52(a), 28 U.S.C. is set forth in the Appendix as Exhibit D.

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STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq. Petitioner, Nancy D. Perkins, alleged that throughout her term of employment with Respondent, Caterpillar Tractor Company, the Company engaged in a series of acts of discrimination towards her because of her female sex or because of a complaint against the Company filed by her with the Equal Opportunity Commission prior to her employment.

Nancy D. Perkins is a 38 year old woman and has not been married. She had attempted employment with Caterpillar for a period of about seven years without success. She filed a complaint with the Equal Employment Commission (E.E.O.C.) which resulted in a conciliation agreement accepting Perkins as an entry level employee on March 21, 1975. As part of the conciliation agreement no mention of how Perkins obtained her job was to be disclosed, but her supervisors were aware of it from the start of her employment.

Perkins had no problems with management for several months. She first encountered problems when two supervisors made suggestions that sexual favors could benefit her desire to advance in the Company. She refused these suggestions and was able to transfer to a different shift. Immediately after she transferred, she encountered difficulties

with management. Various supervisors found fault with her attendance (she did miss work and was late at times); she was watched more closely than others; and her lack of work productivity was cited. It is true that Perkins was not able to produce the same work product, as a woman on a different shift, when called upon to burr cases. However, in cases of her other jobs, she held several others, her work level met the required amount. Other employees who could not meet the work level of a specific job, but could others, were given job transfers as reflected in trial exhibits 2 through 21. Her personal file (trial exhibit 1) was replete with negative entries. Finally, on July 7, 1976 she was terminated for non productivity and for being an undesirable employee. No other employee was terminated for those reasons during the course of Perkins'

employment. There were about 3500 employees.

After termination, Perkins filed a complaint with E.E.O.C. against Caterpillar but not against her union. Upon receiving her right to sue notice, Perkins filed pro se her complaint in district court. She, just prior to filing her suit, called counsel's office seeking representation and was told to file immediately because her time for filing was at hand. In her complaint she named her union, the United Automobile Aerospace and Agricultural Implement Workers of America, Local 751. Counsel, thereafter, was hired and entered the case. The union was dismissed from the case because no charge had been filed against it with E.E.O.C.

The trial was held on September 18 and 19, 1980 before Judge J. Waldo Ackerman. Judge Ackerman found that the evidence presented was diametrically in opposition. But that based upon careful

examination of the facts and careful observation of the demeanor of the witnesses, Perkins had proven her case. He further concluded, that her personal file negative entries were the result of sexual discrimination and therefore pretext.

Accordingly, he ruled that Caterpillar shall reinstate Perkins, expunge her personal file sufficiently to permit her to obtain employment elsewhere and for monetary damages for back pay to the date of reinstatement plus reasonable attorney's fees. A copy of this order is included in the Appendix as Exhibit C.

Caterpillar appealed to the United States Court of Appeals for the Seventh Circuit. Briefs were filed and arguments were held on April 29, 1981.

On January 28, 1982, in an unpublished per curiam order and opinion, the Court

of Appeals for the Seventh Circuit, with Judge Swygert dissenting, reversed the district court and directed the judgment be entered in favor of Caterpillar. In its opinion, the Court of Appeals held that it was left with the definite and firm conviction that a mistake had been committed by the district court as a matter of fact. It stated that the most reliable evidence admitted at trial was trial exhibit one, Perkins' personal employment file, which was made contemporaneously at the time the events occurred and therefore was more believable than testimony at trial, citing United States v. United States Gypsum Co., 333 U.S. 364 (1948). Judge Swygert, in his dissent, stated the case was admittedly close but applying Fed. Rule Civ. Pro. 52(a) he could not find the district court clearly erroneous in his findings of fact. A copy of the opinion is included in the Appendix as Exhibit A.

Perkins timely filed a petition for rehearing and suggestion for rehearing in banc. This petition was denied on April 5, 1982. A copy of this order is included in the Appendix as Exhibit B.

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REASON FOR GRANTING THE WRIT

The decision below has so far departed from Fed. Rule Civ. Proc. 52(a) as to call for an exercise of the Court's power of supervision; it has so greatly expanded the rationale of United States v. United States Gypsum Co., 333 U.S. 364 (1948) as to depart from the accepted and usual judicial procedure.

This case presents a serious and significant question relating to fact finding under Fed. Rule Civ. Proc. 52(a). Rule 52(a) provides that findings of fact shall not be set aside unless clearly erroneous,

and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

If this rule is circumvented, parties in every case heard without jury must fear that they may be trying the case before judges that will never see the witnesses.

The Circuit Court of Appeals for the Seventh Circuit in a split decision reversed the district court's findings of fact, citing United States v. United States Gypsum Co., 333 U.S. 364 (1948). In Gypsum, this Court ruled that if the reviewing court was left with the definite and firm conviction that a mistake has been committed, findings of facts below could be reweighed and a different result obtained. Further, if documentary evidence, which was made contemporaneously with the events in question, was to be weighed against oral testimony at trial; the documents should be given greater value.

Here the Court of Appeals held that the district court erred in not giving documentary evidence more weight than oral testimony. It ruled that Perkins had not proven her case in chief and that the district court should have ruled against her at the close of her evidence.

Upon close examination, it is apparent the Court of Appeals missapplied Gypsum. There is no dispute that Gypsum holds that if a reviewing court is left with a definite and firm conviction that a mistake has been committed, it can change the findings of facts. But before so doing, it should be familiar with the rationale of Gypsum.

Gypsum involved a number of large companies charged with price fixing. The government relied very largely on documentary exhibits against the very people who made them. It also called many of the authors of these documents as witnesses at trial. Both on direct and cross-examination

counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert or that they had agreed to do things which in fact were done. The district court had determined, as fact, that the defendants had not conspired. This Court, hearing the case as a direct appeal from the D.C. Circuit found that when oral testimony such as this is in conflict with contemporaneous documents it can be given little weight and reversed the findings of fact. United States v. United States Gypsum Co., 333 U.S. 364 (1948).

The pertinent factors in Gypsum are: one, the documents in question were made prior to any knowledge on the part of the

authors of any possible dispute with the government and two, the documents were used against the very people who authored them.

The case before this Court is remarkably different factually.

At trial, Perkins' case consisted of her own testimony, the testimony of a fellow employee and documentary evidence consisting of the personal files of twenty-one employees, including Perkins (exhibits 1-21); the conciliation agreement (exhibit 22); and a computation of lost wages up through September 16, 1980 (exhibit 23). Exhibits 1 through 21 were offered for comparison treatment of employees.

At the close of Perkins' case, Caterpillar moved for directed verdict (actually for judgment), the district court took the motion with the case. The court did not recess to review the documents.

At that stage of the trial, the district court was favorably impressed with

Perkins' case as is reflected in its written opinion.

Caterpillar then presented ten witnesses including all authors of the personal file except supervisor Saffer, who had died prior to trial. Eight of the ten witnesses were authors of reports. The district court was able to see, evaluate and judge the credibility of each witness. The court, in its written opinion, noted at three specific places its perception of the demeanor of the witnesses and the weight given to them. Moreover, the court noted that it gave importance to the facts giving rise to Perkins initial employment, ie. the complaint filed with E.E.O.C. and the fact that her supervisors were aware of these circumstances. It noted the manner which Perkins secured her position with

Caterpillar may provide the discriminatory motive which must be shown in a disparate treatment case. The court concluded that was the fact here.

After both sides rested, written arguments were presented and the court considered the case. On November 7, 1980, the court found for Perkins and specifically noted that it believed the demeanor of some supervisors at trial and their conflicting complaints about her work strongly indicated that the record upon which Perkins termination was premised (exhibit 1, her personal file) was replete with complaints and incidents which were, in fact, the result of sexual discrimination on the part of lower-level supervisory personnel.

In this case, unlike Gypsum, the document was consistent with the testimony of the authors at trial. Further, the court found that the authors had reason to make

negative entries contemporaneously with Perkins' work progress. It found the necessary motive from the circumstances of Perkins' initial employment. Surely, a written report consistent with oral testimony cannot be given more weight than the oral testimony, particularly when the fact finder believes the witness to be incredible.

Findings as to factors such as knowledge, design, motive and intent depend peculiarly upon the credit to be given the witnesses by those who see and hear them. Pollice v. Hartford Fire Insurance Co., 355 F. 2d 524, 526 (7th Cir. 1965).

In this case, the district court had seen the witnesses prior to reviewing the exhibit and was able to determine how reliable this supposed ordinary contemparaneous document was. This document, exhibit 1, was found to have been made with the express motive to discredit Perkins.

In a recent appellate decision, Van Ooteghem v. Grey, 628 F. 2d 488 (5th Cir. 1980) the court summarized the proper test for rejecting the district court's findings of fact.

> "Many appellate decisions - especially in Title VII discrimination suits - have characterized the issue of an employer's motivation in dismissing an employee as one of ultimate fact, subject to plenary review. (cases omitted). On the other hand, recent Supreme Court cases in the area have treated the question of the employer's motivation as one of 'subsidiary' fact, subject only to 'clearly erroneous' review. Branti v. Finkel, 445 U.S. 507 (1980); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). 628 F. 2d 491.

Van Ooteghem went on to say that it is improper for an appellate court to subvert the clear mandate of Rule 52(a) by applying the phrase "ultimate fact" to important factual questions or to the last factual determination in a given case, in order to justify "plenary review" of an issue.

Given the circumstances in this case, the Appellate Court should not have rejected the findings of fact. Such action by the Appellate Court is such a departure from the accepted principle of Rule 52(a) as to call for an exercise of this Court's power of supervision.

The Appellate Court also found, after examining the documentary evidence, that no disparte treatment was shown. This too is contrary to the findings of fact by the district court.

The district court, however, had the benefit of seeing the witnesses that complied Perkins' personal file (exhibit 1),

and had determined that it was made with the improper motive of making Perkins look bad. Moreover, the district court had benefit of Perkins' theory of her case as submitted in argument. It did not decide this case from a cold record.

Assuming everything contained in Perkins' personal file is accurate, comparing it with the other 20 files still clearly demonstrates disparate treatment. The other 20 exhibits are replete with notations concerning employees which do not meet the desired level of production, yet no other employees were fired for nonproductivity or for being undesirable. Perkins was terminated for conduct similar to conduct noted in several of the other files, but none of these men were fired for such conduct. The district court recognized this and noted various examples of disparate treatment.

In summary, the district court believed Perkins' witnesses, it did not believe Caterpillars' witnesses. It found that the personal file of Perkins, compiled by Caterpillar's supervisors, was motivated by impermissible sex discrimination and therefore incredible. Accordingly, the Writ of Certiorari should be granted, the judgment of the United States Court of Appeals for the Seventh Circuit reversed, and the cause remanded with directions to the United States District Court for the Central District of Illinois to enter judgment in accordance with its order of November 7, 1980.

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CONCLUSION

For the aforesaid reasons, a Writ of Certiorari should issue to review the

judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Counsel for Petitioner

October, 1982

App. 1

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard April 29, 1981

January 28, 1982

Before

Hon. Luther M. Swygert, Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Inzer B. Wyatt, Senior District Judge*

NANCY D. PERKINS,

Plaintiff-Appellee,

No. 80-2737 vs.

CATERPILLAR TRACTOR CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois
Springfield, Illinois
No. 78 C 3102
J. Waldo Ackerman, Judge

*Senior District Judge Inzer B. Wyatt of the Southern District of New York is sitting by designation.

ORDER

Caterpillar Tractor Co. ("Caterpillar") appeals from an order entered November 7, 1980, granting relief to plaintiff Nancy D. Perkins ("Perkins") in an action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e and following; sometimes hereafter "Title VII" or "the EEOC Act") for claimed sex discrimination by Caterpillar in having terminated her employment. (The notice of appeal describes the order as "the final judgment entered in this action on November 7, 1980" but since, according to the civil docket, no judgment was ever entered, the description is in error).

We reverse the order made below and remand the cause with instructions to enter a judgment in favor of defendant Caterpillar.

The action was commenced on June 29, 1978. Caterpillar and the United Automobile Aerospace and Agricultural Implement Workers of America, Local 751 ("the Union"), were named as defendants and were served. It appears that Perkins was being advised at that time by counsel she had retained, but a standard form complaint supplied by the clerk was used and was signed by her and not by counsel. The complaint showed that Perkins had been employed by Caterpillar and it claimed acts of discrimination on account of her sex, primarily, if not entirely, her discharge.

Motions to dismiss were filed by both defendants and were referred to a magistrate. The basis for the motion by Caterpillar was that the charge filed with the Equal Opportunity Commission ("EEOC"; 42 U.S.C. § 2000e-4) was not timely in that it was filed more than 180 days after the occurrences giving rise to the complaint. The basis for

the motion by the Union was that no charge against it had ever been filed with EEOC. Apparently, before the Magistrate, counsel for Perkins agreed that the motions had merit as the record then stood and conceded that no charge had ever been filed with EEOC against the Union. It seems that counsel for Perkins explained to the Magistrate that no claim would be pursued against the Union but that, by amendment, a claim could be stated against Caterpillar and asked leave to file an amended complaint.

On August 30, 1979, the Magistrate filed a recommendation that the two motions to dismiss be granted; nothing was said about leave to amend.

On September 7, 1979, objection to the Magistrate's report was filed by Perkins; the objection was that nothing was said about leave to amend.

On October 10, 1979, an order was entered by the district court granting, as recommended,

the motions of each defendant to dismiss the complaint. The court took note of the request for leave to amend, described as a "motion", and referred the "motion . . . to the Magistrate for resolution".

On October 22, 1979, Perkins did file a motion for leave to file an amended complaint; her proposed amended complaint was attached to the motion papers. While the amended complaint continued to show the Union as a defendant in the caption, the pleading described only Caterpillar as the defendant and made clear that only one claim was being prosecuted, that against Caterpillar.

By endorsement of the Magistrate, entered November 26, 1979, on the motion papers, the motion for leave to file an amended complaint was "allowed". On the same date an amended complaint was filed. It appears that this filing was accomplished by separating the amended complaint from the

motion papers to which it had been attached, placing it in another part of the Clerk's file, and entering it as having been filed November 26, 1979.

The amended complaint dropped the claim against the Union, dropped some of the averments of discriminatory acts, added others, and repeated most of those from the complaint. The amended complaint was drawn by counsel and had the typed signature of counsel.

With the filing of the amended complaint, the Union ceased (except perhaps in a technical sense) to be a party to the action, which continued against Caterpillar alone.

The trial took place before Judge Ackerman without a jury on September 18 and 19, 1980.

An order with opinion was filed by the trial judge on November 7, 1980, and was entered on the same date. The conclusions are set forth at the end as follows:

> Accordingly, I find that plaintiff has successfully established that the reasons set forth by defendant for Perkins' dismissal are merely pretextual, and that plaintiff has been the victim of unlawful discrimination. Relief is hereby granted to plaintiff under the provisions of 42 U.S.C. § 2000c et seq., in an attempt by this Court to make the plaintiff whole.
>
> * * *
>
> The defendant shall reinstate plaintiff to a position in its work force in the same salary range and responsibility level of her position with Caterpillar at the date of her termination. In addition, expungement of plaintiff's employment record is ordered by this Court, in order to allow plaintiff a record sufficient to permit her to obtain employment elsewhere if she would desire to do so . . . Monetary damages for plaintiff for back pay to the date of her reinstatement and reasonable attorney's fees are hereby ordered as well.

The money amount of back pay has never been determined and no judgment was entered.

Caterpillar filed on November 21, 1980, a motion for a new trial or for alternative relief and on the same date the motion was denied by endorsement of the trial judge.

This appeal then followed. The notice of appeal omits the Union from the caption.

In Texas Dept. of Community Affairs v. Burdine, ___U.S.___, 101 S. Ct. 1089 (March 4, 1981), the Supreme Court last addressed the question of the plaintiff's burden of proof in a Title VII sex discrimination employment action. The Court repeated that the first burden on the plaintiff was to prove "by the preponderance of the evidence a prima facie case of discrimination". The nature of this first burden of the plaintiff in the Burdine case was further described as follows:

> The plaintiff must prove by a preponderance of the evidence that she applied for an available position, for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

To paraphrase this description to fit the trial here: Perkins was required to prove by a preponderance of the evidence that she was working for Caterpillar in a position for which she was qualified but was discharged.

under circumstances which give rise to an inference of unlawful discrimination.

The claim made by Perkins is what has been classified by the Supreme Court as "disparate treatment" (as distinguished from "disparate impact"). To prove a prima facie case where the claim is disparate treatment, a plaintiff must show a discriminatory motive by the employer. This was made clear in Teamsters v. United States, 431 U.S. 324 (1977) where it was said (431 U.S. at 355 fn. 15):

> "Disparate treatment" such as is alleged in the present case in the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Based on McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) and Teamsters v. United States, above cited, as applied by this Court in Flowers v. Crouch-Walker Corp.,

552 F. 2d 1277, 1282 (1977), Perkins, for a prima facie case, was required to show by a preponderance of the evidence these essential elements:

(a) that she was a woman;

(b) that she was qualified for the job she was performing;

(c) that she was satisfying the normal requirements in her work;

(d) that she was discharged; and

(e) that there was a discriminatory motive for her discharge.

The case for Perkins at trial consisted of her own testimony, the testimony of one fellow employee, and documentary evidence.

The documents offered by plaintiff were marked Exhibits 1-23 and were received over objection of Caterpillar.

Exhibit 1 was the personnel file of Caterpillar relating to Perkins.

Exhibits 2 through 21 were personnel files of Caterpillar relating to employees, nearly all of whom had been discharged.

Exhibit 22 was the conciliation agreement between EEOC, Perkins and Caterpillar. Whether this conciliation agreement was properly admitted over objection by Caterpillar is a matter of some doubt, later to be discussed. In any event, the conciliation agreement - executed by Perkins, EEOC, and Caterpillar - includes an offer of employment by Caterpillar to Perkins, specifically stated to be in "an entry level position . . . on the 2nd shift". We understand that an "entry level position" is for unskilled labor at the lowest pay rates. We understand from the record that the first shift is from 7:18 a.m. to 3:18 p.m., the second shift from 3:18 p.m. to 11:18 p.m., and third shift from 11:18 p.m. to 7:18 a.m. Perkins accepted the entry level position on the second shift and released Caterpillar from all prior claims on her part.

Exhibit 23 was a memorandum of Caterpillar - evidently prepared in preparation

for trial - showing what wages Perkins would have earned had she worked from May 20, 1976, through September 16, 1980.

Having presented the evidence described, plaintiff rested. Defendant then moved "for directed verdict". Since there was no jury, the motion was technically inappropriate but was apparently understood as one for dismissal at the end of plaintiff's case in a nonjury trial (Fed. R. Civ. P. 41(b)).

The Court stated in respect of the motion: "I'll take the motion with the case". We understand that the Court was reserving decision on the motion and requiring defendant to proceed with its case.

Whether or not the refusal of the trial court to grant the motion is to be reviewed under the "clearly erroneous" rule (Fed.R. Civ.P. (52)), we are "left with the definite and firm conviction that a mistake has been committed" (United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)) and

that the motion should have been granted.

3.

The most reliable evidence offered for Perkins was Exhibit 1, her personnel file at Caterpillar. This file contains written records made in the regular course of business, made at the time of the events reflected in the records, made by entrants having a personal knowledge, and made long before this action was commenced. Exhibit 1 is an exhibit of Plaintiff; she evidently relies on what is therein contained.

The events leading up to the discharge of Perkins and the commencement of this action can be best understood by a close study of the personnel file.

Perkins was born August 29, 1943 and is thus now 38 years old; she has not been married.

She was hired by Caterpillar on March 21, 1975. She was then 31 years old. She was a high school graduate and had been working since 1961. She had worked at many different

jobs, including house painter, auto refinisher, computer operator, and press operator. She had been in the Marine Corps for a time, doing clerical work.

Perkins was hired by Caterpillar as a "burrer" on the second shift, after she had shown on her application that she had operated a drill machine. On her hiring record is a notation: "This applicant has the ability to advance to semi-skilled job".

On March 24, 1975 she was shifted to be a "weld cleaner". The reason given was "a more urgent opening". There was a small increase in pay.

Under the established practice at Caterpillar, there was a probationary period of 30 work days and the "first progress report" was due from the supervisor on the 31st day of work.

On April 28, 1975, Saffer, her supervisor, made the first progress report on Perkins who was then in section 7142 on the second shift. Saffer made a favorable report and stated as follows: "I recommend that Miss Perkins be retained. I believe that she will make a good employee".

On May 23, 1975, Saffer recommended that Perkins be given a "merit increase" in pay. His performance evaluation on that date was "good" in the five listed categories.

On September 19, 1975, Saffer made a "matter of record" notation as to Perkins as follows:

> Poor work effort, poor work habits, not working efficiently. Miss Perkins was told on 9-19-75 that if her work effort and habits did not improve that it would lead to disciplinary action.

Ms. Perkins feels that I should not tell her how long to run piece parts in shotblast and should not spend as much time as I do in the area overseeing her work. I informed Ms. Perkins that this was part of my job as a supervisor.

Ms. Perkins was taking her personal time at 5:00 & 9:00 whether shotblast was loaded and running or not. I informed Ms. Perkins that I felt she had sufficient time for personal time while the shotblast was running its cycle which is from 10 to 30 minutes.

Ms. Perkins feels that she should be able to run the shot-blast the way she wants, instead of the way I tell her which I feel is much more efficient.

Ms. Perkins has had a terrible attitude towards the company and management since her move to 3rd shift has been cancelled.

On the same date her record showed that since March 21 she had been absent 14 days, late 1 day, and left early 3 days.

On October 2, 1975, Saffer advised granting a request of Perkins to be put on the third shift. In this connection he reported, among other things, as follows:

> At times Ms. Perkins has to be prompted to produce. She also has to be reminded from time to time about company practices and rules.
>
> Ms. Perkins requires close supervision.

At the same time Saffer made the asked for report on his "last performance discussion" with her:

> 9-19-75 I talked with Ms. Perkins about her work effort and work habits. I told Ms. Perkins that it was going to have to improve.

On October 2, 1975, her record showed that since March 21 she had been absent 15 days and left early 4 days.

On October 6, at her request, she was moved to the third shift and to section 7144, remaining as a weld cleaner. Marquis became her supervisor. Nelson was the new general foreman.

On October 23, 1975, Marquis made a "matter of record" notation as to Perkins as follows:

> This is a matter of record for for poor work habits. On 10-22-75 Nancy was observed drinking coffee and visiting for 17 minutes. She had been told previously she was abusing her personal time and I expected her to hold it under 10 minutes. I told her if she didn't correct her personal time habits I would be forced to take more serious action. In the discussion with her and the steward M. Miller #7926 I told Nancy her work habits and effort was unacceptable. She was not applying herself to her work and has openly admitted to me several times she doesn't like her assignment and isn't going to put any effort into it. On 10-20-75 she told G.F. Nelson she didn't like her job and was not going to apply herself or "bust her ---". I told her she had a job to do and I expected her to produce efficiently and as effective as the other cleaners. She said she only has to work 8 hrs for 8 hrs pay and I told her 8 hours of effective, productive labor, not piddling around and just acting busy. If she doesn't

> conduct herself in a workmen like manner and correct her poor effort I will also take serious action to help correct the problem.

On November 3, Marquis recommended that Perkins be changed from "weld cleaner" to "shot blaster". He gave the reason for this change as follows:

> This is a demotion mutually agreed upon between the company and Ms. Perkins. She wanted out of weld cleaning because she didn't like the work. Several times during my conversation with her she claimed she was unable to do the job and had no intentions of applying herself. Her work effort was very unsatisfactory to the point disciplinary action was being initiated to correct it.

As further comments he reported:

> Nancy was on a job she didn't like and admittedly tried to fail in all aspects of it to get herself moved.

In answer to a question on Caterpillar's standard form for actions "needed to improve employee's performance", Marquis wrote:

> Give an aptitude test and place where best fitted and happiest. Also take a firm disciplinary stand with her work efforts.

Below this answer, in another handwriting (apparently that of Manion, job coordinator) is the comment:

> No aptitude tests are given at Decatur plant E.W.M.

To describe his "last performance discussion with employee", Marquis wrote:

> 10-27-75 - She was glad to be moving to a job she claims would be easier.

On a part of the company form, Marquis made a performance evaluation. As to safety, the rating of Perkins was "satisfactory"; as to quality of work her rating was "below average"; and as to quantity of work, initiative, and job conduct and use of work time, the rating was "unacceptable". There was a statement that between October 1 and October 27, 1975, Perkins was absent two days; the words "back trouble" appear.

The change requested by Perkins (from "weld cleaner" to "shot blaster") was made, effective November 3, 1975. By reason of

change to "shot blaster", she went from the supervision of Marquis to that of Gilbert and to section 7188.

The records show that it was not long before Perkins wanted, and requested, another change.

On November 22, 1975, Gilbert recommended that Perkins be changed, at her request, from shot blaster to mobile equipment (jeep) operator. He reported at the same time as follows:

> Ms. Perkins has been under my supervision for a period of four weeks. This is not enough time to accurately evaluate Ms. Perkins work or potential. However Ms. Perkins has established an attendance record that must be corrected. When Ms. Perkins came to me she had accumulated 19 irregularities from March 21 thru Sept. 30. Two more from Oct. 1 thru Oct. 24. Since Oct. 27 she has five more. On Nov. 4 I talked to Ms. Perkins and explained that her attendance was in need of correction. Ms. Perkins missed work on Nov. 10 & 11. When she returned she had a Drs. slip. Ms. Perkins missed again on Nov. 17 because she overslept. This was the 3rd consecutive Monday she had missed. (Nov. 3, 10 & 17). In our next conversation, I told her that she could not afford to miss work with exception of sickness supported

> by a doctor's slip or an emergency. An absence for any other reason could result in disciplinary action.

And his "last performance discussion with employee" was reported as follows:

> Nov. 18. We talked about attendance and work effort.

There is a notation that from March 21 to November 21, 1975, Perkins had 24 absences. (This, it will be noted, is an average of 3 absences per month.)

The change to jeep operator was made as requested by Ms. Perkins. It was effective November 24, 1975. As a result of this change Perkins passed from the supervision of Gilbert to that of Massey, who served under Tracy, a general foreman, in section 7146.

On December 12, 1975, Tracy recorded a disciplinary suspension of Perkins as follows:

At approximately 12:50 A.M. December 12, 1975 Darrell Stremming (Safety investigator) located me in Bldg. "E" and told me he had received complaints from employees in Bldg. "B", that the Weld Stores jeep operator was driving too fast. I told him I had a meeting at 1:00, that it would not last long and I would investigate the complaint as soon as possible. During the meeting Roy Crowe a Gen. Foreman in Bldg. "B" called me and said the union Safety Sub-Committeeman had complained to him about the jeep operator and wanted me to look into it. I told Roy to tell him I would be there very shortly. I arrived in Bldg. "B" at approximately 1:15 and located the vehicle with 4 trailers attached, however the operator Nancy Perkins was not in it. I asked the power trucker who was unloading the trailers the whereabouts of the operator and he said he did not know where she was. After several minutes I saw her talking on a pay phone in a stairway leading to the mezzanine. I went to a nearby desk to wait for her. As she was returning to the vehicle I stopped her and told her I wanted to talk to her. I said "Nancy I have received complaints from several employees that you have been driving too fast." At this point she became irrational and loud and said "Tracy you and all of them are goddammed liars and are full of ---- if you think I have been driving too fast, I do my job, just ask any of the guys on c/o and they will tell you so." She continued to talk rapidly with comments as we are going to get this ---- straightened

out, you lying son-of-a- ----- are not going to get my ---. I said Nancy quiet down, and stop the filthy and abusive language. During the time she had been talking it was apparent by the smell of her breath that she was under the influence of alcohol.

At this time I asked her if she had a coat in her vehicle and she said she did. I told her to get her coat, that I would wait for her and then we are going to Weld Stores to see your union representative. She replied "Goddam you Tracy this is Caterpillar, not the Army or Marines and you cant order me to go get my coat." I replied, "if you dont want to get your coat then lets go." As we were walking to Weld Stores she kept up her rapid talk and abusive language stating "Tracy you have been on my --- all week, all of the guys in Weld Stores know this and I think you have been acting like a big --------. I know you dont want me on this job because I am a woman, what do you have against women? I dont think you are much of a man and I dont know why Caterpillar puts up with you." At least twice she lunged into me as we were walking and it was my opinion this was due to her incoherence.

Upon entering Bldg. "W" we went directly to the union steward Oscar Lanto. I told him I had brought Nancy to have union representation . . . that she was being "indefinitely

Suspended" for being under the influence of alcohol. At this time she began her abusive language again stating "you are a Goddamed liar if you think I am drunk, you are nothing but a dirty son-of-a- -----" and attempted to grab my arm and insist I walk a line with her. I then told the steward I had taken as much abuse from her as humanly possible and I was giving them 5 minutes to represent her and I was going to call Plant Security to come and remove her. They then proceeded to discuss and write the grievances. As they were taking care of the union business Miss Perkins kept making hand and finger gestures at me and several times she referred to me as a no good Son-of-a- -----.

During the time they were preparing the union business I realized I had not given her her paychecks and called Foreman Renfer to bring them to me. Perkins and Lanto were finished before Renfer arrived with the checks. After I had paid her I asked her where she was parked and when she told me I called Plant Security to unlock the gate. I asked Renfer to go get her coat and meet me at the gate. During the walk from Bldg. "W" to the gate she began her abusive language again saying I shouldn't even be working at Caterpillar let alone be a Gen. foreman, that I was about as low down a Son-of-a- ----- she ever knew, that she sure didnt have any respect for me as a man. She said I had sure made an --- of myself tonight. As we approached the gate she saw the security offer and yelled at him "hey do you think I am drunk? You better get a shovel you might need one to scoop me up."

> At the gate we waited several minutes for Renfer to bring her coat and when he arrived I gave it to her and she left the company premises.

On January 13, 1976, Massey recommended that Perkins be changed from jeep driver to burrer. The reason given was as follows: "to correct an error in the transfer procedure, and her inability to safely operate the mobile equipment." His performance evaluation at that time was as follows:

Quantity of Work Actually Produced	Below Average
Quality of Work Actually Produced	Below Average
Safety Performance	Unacceptable
Initiative in Performing Assignments	Below Average
Job Conduct and Use of Work Time	Below Average

Massey recorded his comments as follows:

> Ms. Perkins is a C-607 jeep driver. She has the responsibility of pulling W/Stores train on a regular schedule to deliver weldments to Bldg. 'B' Weld Shop. Her efficiency and thoroughness of doing this job is barely satisfactory. I have had to remind her on several occasions to maintain her work schedule. Her attitude toward her job and the company leaves a lot to be desired. Ms. Perkins constantly complained about the conditions she has to work under and wanted to take one of

> new jeeps from another employee and give him an older one. She seemed to have a good relationship with her fellow employees. Ms. Perkins has a problem of accepting management directives. She has a tendency of leaving her equipment for a prolonged period of time. Her safety record indicates a lack of concern for herself, others, and the equipment she operates.

Massey replied to a question as to what actions were needed to improve Perkins' performance, as follows:

> A reintroduction to her responsibilities to her job. A change of attitude, in general, would be most helpful.

Massey described his last performance discussion with Perkins as follows:

> I last discussed Ms. Perkins work effort and attitude with her on 1/9/76. She was not receptive to my comments, offering instead various reasons as to why she was not getting the job done as it should be.

There is a notation that from October 1, 1975, to January 13, 1976, Perkins was absent 10 days. This then appears: "2 days sick 4 days disciplinary suspension left early 1 day sick 4 days absent from previous dept. No reason given."

The change recommended by Massey (that is, from jeep driver to burrer) was made, effective January 13, 1976. As a result of this change, Perkins went from the supervision of Massey back to that of Gilbert.

On January 16, 1976, Mendenhall, a foreman to whom Perkins had been "loaned" by Gilbert, made a "matter of record" as to Perkins for "unsatisfactory attendance". He reported his reasons as follows:

> Nancy came to me with an attendance problem. I asked her on 1/16 why she was absent on 1/15/76 she told me that she was sick. I reminded her that she was talked to on 11/24/75 by Foreman Massey & Foreman Tracy about her attendance. I asked her if she told them at that time she would improve. She told me yes she did. I said that since then she hasn't improved. At this point I told her that I wanted her to bring in verification of her absence. She felt that this is unreasonable.
>
> Based on a two day attempt to talk to her she has shown a poor attitude in accepting her position with the company. She shows the tendency to do what she wants & not what she is expected to do.

There is a performance evaluation in which Mendenhall rated her performance "unacceptable" in each of the five classifications asked about.

On February 18, 1976, Gilbert, her supervisor, made a "matter of record" as to Perkins. This read as follows:

> Ms. Perkins was absent on 2-17-76. This was the 19th irregularity for Ms. Perkins since Oct. 1, 75. Ms. Perkins has been talked to on various occasions about her attendance by myself and other supervisors she has worked for. When Ms. Perkins returned to work 2-18-76 I asked her about her absence. She said she had overslept by 3 hours and decided not to come to work. I told her once more of her position concerning attendance and stated that the next time she missed without a proper excuse I would start disciplinary action.

In an accompanying performance evaluation Gilbert rated Perkins "good average performance" for safety and in all other respects rated her "below average".

On February 21, 1976, Mendenhall recommended reassignment of Perkins from burrer to shot blaster. In an accompanying performance evaluation, Mendenhall rated her as

to safety "good average performance" and in all other respects he rated her "unacceptable". He explained his rating as follows:

> Nancy is capable of doing more than she does. But in the short time of two weeks, she has shown that she could care less about her work or her work habits.
>
> She openly invites trouble. She likes to visit with anyone who will listen to her. She has stated to me that I should be a nice guy and not expect so much from her, because she isn't going to do anymore than she wants to.
>
> I have the impression that she just wants a pay check and doesn't want to work for it.
>
> She requires and actually demands close supervision.

As to a question for what actions are needed to improve her performance, he answered:

> Her attitude will have to change before she can improve in her work and her habits.
>
> Nancy wants to be treated differently than other employees.

He reported his last performance discussion with Perkins as follows:

> I told Nancy that she had lousy work habits. I explained that she was not any different than anyone else who worked for me. I told her I expected her to show improvement immediately. She resisted any approach to get an agreement from her on this.

On March 2, 1976, Gilbert, her supervisor, issued a "warning notice" to Perkins. The reason was stated in the notice to be "unsatisfactory attendance". The notice also stated: "The Company believes the above act, if continued, will result in disciplinary action or discharge".

Gilbert reported the facts as to this disciplinary action in the prescribed "progress report", under date of March 3, as follows:

> On the occasion of Ms. Perkins last attendance irregularity, 2/17/76, I talked to her again about the seriousness of her problem. She has been talked to by myself and two other supervisors that she has worked for. She has been told that she must have verification for absences. When Ms. Perkins missed work 3-1-76 she called in at 2:15 A.M. to report the

> absence. When she came in 3-2-76 she did not have a doctors slip to verify her illness. Ms. Perkins was issued a Written Warning for unsatisfactory attendance. After receiving union representation Ms. Perkins went to 1st Aid in an attempt to prove her illness. The nurse stated that Ms. Perkins temperature was normal. Ms. Perkins then decided to go to the doctor the next morning. Ms. Perkins did not go to the doctor Tuesday morning because "She was too sick to go". Ms. Perkins did go to the doctor Wednesday. No statement was made on the doctors slip that Ms. Perkins was unable to be at work on 2-29-76, and although he recommended she take the rest of the week off she did in fact work the balance of the week.

Gilbert's performance evaluation as of March 3, 1976, was "below average" as to three classifications and "unacceptable" as to two. There is a notation that from March 21, 1975, to March 1, 1976, Perkins was absent 35 days, of which 3 were medical and 4 were disciplinary suspension.

Gilbert was then replaced by Tanzyus as supervisor of the assembly line section on which Perkins was employed (7188).

On May 20, 1976, Perkins reported late for work after having been similarly late on several days and after having been talked to about it. For this, Tanzyus gave her a two day disciplinary suspension. He reported facts as to this disciplinary action on the same day on the company form as follows:

> On May 20, 1976 Ms. Perkins was given disciplinary action (2 days off) for excessive attendance irregularities. A matter of record for attendance was written on Feb. 23, 1976 and she was given a written warning on March 2, 1976, also for attendance. When given the warning she was told that any time she was off she was to bring in an excuse proving her absence. Since the date of the written warning she was off sick April 1, 1976 and was talked to by Mr. Gilbert. On April 20, April 23 and May 3, 1976 she came in late because of oversleeping and I talked to her on each occasion. I told her if the problem was not corrected I would take disciplinary action. On May 20, 1976 she came in late with the excuse that she overslept. I told her since the problem has not been corrected, with the number of times she came in late with the number of times she had been talked to, that I had no other choice but to take disciplinary action. She was then given union representation and left company property with no argument, on a 2 day disciplinary suspension.

At the same time (May 20, 1976), Tanzyus made a performance evaluation report as to Perkins. As to quantity of work produced, he rated her "below average"; as to quality of work produced, he rated her "average"; as to safety, he rated her "average"; as to initiative in performance assignments, he rated her "unsatisfactory"; as to cooperation and self discipline, he rated her "below average"; and as to attendance and punctuality, he rated her "unsatisfactory".

It was then decided to transfer Perkins from the job of shot blaster in section 7188, where Tanzyus was supervisor, to that of burrer in section 7142, where Tullis was supervisor. The transfer was reflected in the employment record as effective June 21, 1976, but in fact Perkins began working on June 18, 1976, as a burrer under Tullis as supervisor. It was a few days later, on June 24, 1976, that Tanzyus reported a performance evaluation of Perkins. As to

quantity of work (shot blasting), he rated her "average"; as to quality of work, he rated her "below average"; as to safety, he rated her "average"; as to initiative in performance assignments, he rated her "unsatisfactory"; as to cooperation and self discipline, he rated her "unsatisfactory"; and as to attendance and punctuality, he rated her "below average". He explained this evaluation as follows:

> Ms. Perkins has been operating a "B" shot blaster for me and has been doing a below average to average job. Nancy seems to be a safety minded employee and tries to observe all company practices in this area. Her initiative in performing assignments and accepting responsibility is very poor. Her work habits are also poor and she needs close supervision in this area. Nancy also thinks everyone is picking on or out to get her so she is a very hard employee to talk to. Her attendance is below average and she has had two days disciplinary action for this problem. Nancy has a good head on her shoulders and if she wanted to be, could be an above average employee.

The employment records show that Tullis, on June 24, 1976, suspended Perkins for being away from her work area too long; that Perkins went to Gully, the union steward, with a grievance; that Gully arranged a meeting on June 25 with Caterpillar representative Tullis (supervisor), Crowe (general foreman), and Morthland (superintendent). Perkins attended with Gully, the union steward. Caterpillar agreed to remove the suspension.

From the time she began as a burrer under Supervisor Tullis on June 18, 1976, Perkins had been burring only 3 cases per 8 hour shift as against 10-12 cases per 8 hour shift average and expected burring production. On June 30, 1976, Tullis issued to her a written warning for "ineffective work habits". Tullis on the same date made his report of this on the company form as follows:

> Nancy Perkins was issued a written warning on 6/30/76 for ineffective work habits. The events leading to this action are as follows.

Perkins began work in 7142 on 6/18/76. Problems concerning work effort and personal time abuse were evident beginning on the first day Perkins came to the line. On 6/24/76, this employee was suspended for being away from her work area too long. This suspension was removed on 6/26/76 as the result of a meeting between Perkins, Gully, Morthland, Crowe, and myself. In this meeting, it was clearly understood between all people present, exactly what was expected in the areas concerning work effort (10-12 cases per shift) and the use of the personal time.

On 6/24/76, I had conversation again with Perkins concerning work effort and number of cases expected per shift. Only 3 cases burred this day.

On the day prior to this, 6/28/76, Perkins did not abuse personal time but achieved only 3 cases.

On 6/30/76, talked to Perkins early in shift, received a negative response, she said it would be impossible to get more than 4 cases per shift. Repeat of 3 cases this day. 5:00 A.M. - I issued a written warning. At this time, I told Perkins, without improvement in work habit, further disciplinary action will be taken.

His performance evaluation on the same day rated Perkins average as to two qualities, below average as to three, and unsatisfactory as to one.

The next employment record is the report of Tullis on July 7, 1976, on his discharge of Perkins. This is on a standard form which shows separation on that date. It shows her then job classification as "Burrer (B)". There is a sheet which asks for events which led to separation. Tullis reported these events as follows: "Nancy Perkins . . . was discharged at 4:18 A.M. on 7/7/76 because she has failed to perform her job in a satisfactory manner and because she is an undesirable employee". On the same sheet, there are 7 numbered "discharge reasons" with a blank box alongside each reason for checking off the reason for the particular discharge. There is an eighth numbered blank line for writing in some reason "(other)" than the 7 reasons stated on the form; there is a blank

box alongside the blank line for checking off the "other" reason written there for the discharge. The form seems to call for checking one reason because it directs "check reason below". Tullis checked two reasons, "lack of efficiency" and on the blank line wrote "undesirable employee" and checked it also. Matthew, job coordinator in the Caterpillar Employment Office, has crossed out on July 8, 1976, the "lack of efficiency" reason and has dated and initialed the crossing-out alongside. At the bottom Matthew has written and signed this explanation of his action:

> The EPIC System cannot accept more than one separation code.
>
> Any employee who has an occasion to discuss this separation with anyone should make certain he or she indicates Miss Perkins was separated for lack of efficiency and for being an undesirable employee. Labor Relations agrees with this statement.

To summarize the employment history of Perkins in the year 1975:

March 21	hired as Burrer B on second shift (3:18 p.m. to 11:18 p.m.) Saffer is supervisor
March 24	transferred to weld cleaner - small pay increase
April 28	favorable probationary period report
May 23	merit increase in pay
September 19	matter of record notation for poor work effort, poor work habits, inefficient work, excessive personal time off, bad attitude toward company and work
October 6	transferred at her request to third shift (11:18 p.m. to 7:18 a.m.) - she is now under Marquis as supervisor
October 23	matter of record notation for poor work habits, excessive personal time off, poor work effort; discussed with Perkins and union steward that her performance was unacceptable

November 3	transferred at her request to an "easier" job, that of "shot blaster" from weld cleaner, a job she said she did not like and had tried to fail in order to get moved; she is now under Gilbert as supervisor, who from time to time loans her to Mendenhall, another supervisor.
November 3	performance evaluation: "unacceptable" in three categories, "below average" in one, and "satisfactory" in one
November 22	notation that days of absence and repeated tardiness from oversleeping were excessive; she was told disciplinary action could result.
November 24	transferred at her request from shot blaster to jeep operator; she is now under Massey as supervisor; Tracy is general foreman
December 12	disciplinary suspension, indefinite at beginning, 4 days at end; for unsafe jeep driving, intoxication, filthy and abusive language to general

	foreman; she and union steward advised; grievance procedure invoked but dropped

To summarize the employment history of Perkins in 1976:

January 13	performance evaluation: "below average" in four categories, "unacceptable" in one
January 13	transferred from jeep driver to burrer; she is now back under Gilbert as supervisor
January 16	matter of record notation for work absences, poor work attitude
January 16	performance evaluation; "unacceptable" in five categories
February 18	matter of record notation for work absences
February 18	performance evaluation: "below average" in four categories, "average" in one
February 21	performance evaluation: "unacceptable" in four categories, "average" in one
March 2	warning notice issued for unsatisfactory attendance

March 3	performance evaluation: "unacceptable" in two categories, "below average" in three
March-April	Tanzyus replaces Gilbert as supervisor of Perkins
May 20	disciplinary suspension (two days) for excessive work absences and tardiness (oversleeping)
May 20	performance evaluation: "unsatisfactory" in two categories, "below average" in two categories, "average" in two categories
June 18	transferred from shot blaster to burrer (effective in records on June 21 but she began working as burrer on June 18); she is now under Tullis as supervisor
June 24	performance evaluation: "unsatisfactory" in two categories; "below average" in two categories; "average" in two categories
June 24	disciplinary suspension for excessive personal time absences from work area; after meeting with Perkins and union steward, suspension removed

June 30	written warning for ineffective work habits (production considerably below average)
July 7	discharge

4.

As we read the opinion below, at its outset a finding is made that Perkins had an "unsatisfactory employment record" which "was the basis for her ultimate dismissal by Caterpillar." But the "unsatisfactory employment record" was caused by "discriminatory acts" during the course of her employment, which "acts then appeared as accumulated degradations on Perkins work record, and resulted in her termination . . .". The conclusion from the "facts" and "the demeanor of the witnesses at trial", is that Perkins "established a prima facie case of sexual discrimination, and proved . . . that the defendant's reasons for her dismissal were pretextuous".

The principal reasons for the conclusion, in the order in which they appear in the opinion, are these:

(a) Perkins was qualified for her jobs, performed them "within an average range", and met "the standard required";

(b) the fact that Perkins obtained her job as a result of the EEOC conciliation process (mistakenly called a "lawsuit" by the district court) "provides an apparent, overt, discriminatory motive" for her discharge; she was "the victim of sexual discrimination stemming from the complaint lodged with EEOC by which she acquired her job";

(c) Perkins told her "two immediate supervisors" that she wanted "to advance to another job or to be accepted in a training program" and they then made "sexual advances" from which she knew that "her submission was required for advancement"; this was an "instance" of "sexual discrimin-

ation";

(d) other instances of sexual discrimination against Perkins were "over-supervision" by supervisor Marquis, refusal on one occasion to give her a pay check until she returned to her work area, disciplinary action by general foreman Tracy for driving a jeep recklessly and too fast and for foul language and intoxication; and

(e) examination of the employment files of all employees fired "clearly illustrates the discrimination" in that "[E]mployees with far more absenteeism than Plaintiff, each of them male, were not fired."

These reasons were formulated after accepting the opinions, beliefs, conclusions and other testimony of Perkins, the witness who had the greatest interest in the outcome of the trial, as opposed to contemporaneous written records made in the regular course of business and offered in evidence by plaintiff herself.

As we read the record, there was no evidence to show prima facie that Perkins was "qualified" as a burrer, the job to which she was assigned at the time of her discharge. She had earlier worked as a shot blaster and jeep driver but the evidence did not show that she was "qualified" for these jobs either.

She was hired as a burrer, doubtless because on her application she showed that she had operated a drilling machine and burring involves the use of such a machine. The evidence for plaintiff showed that she was not qualified as a burrer because of lack of productivity - she could not or would not burr more than 3 transmission cases per 8 hour shift whereas 9 or 10 to 12 cases were the minimum expected production and the production turned out by the burrer on the first shift, who was also a woman.

Burring, shot blasting, and jeep driving are all ordinary unskilled labor jobs - "entry level" positions, as called for by the conciliation agreement. Shot blasting and jeep driving, however, are not jobs having any "productivity" level against which the performance of an individual can be directly measured. Plaintiff herself made this clear in her own testimony when she said (T 45) with reference to "productivity" that "there wasn't such a thing on the Jeep or the shot blast". She was not discharged for lack of productivity as a jeep driver or shot blaster.

One of the reasons for her discharge was lack of productivity as a burrer in the period after June 18, 1976, when she was under the supervision of Tullis. She conceded in her testimony (T 30-31) that the dates in her employment file were accurate. According to her testimony (T 57-60), she understood throughly that after June 18,

1976, the principal objection to her performance was lack of productivity as a burrer, the job for which she was hired and the job to which she was assigned after June 18, 1976. She testified (T 59):

> A. I was told that the day shift is putting anywhere between nine and twelve cases out, and I was expected to do the same. I was only putting out three.
>
> Q. All right.
>
> Now, when you say you were putting out three, are you saying you put out three during an eight hour shift?
>
> A. Yes.

She further testified (T 70) that the worker burring cases on the day shift was a woman and that she realized her production was being compared to that of another woman. She also was advised by Tullis that unless her production improved "there will be action taken". She testified (T 70-71):

Q. And what did he tell you?

A. He was saying that I had to put out more than three cases a -- a shift.

Q. And what did you say?

A. I'm doing the best that I can.

Q. Did he make any response?

A. The response was, that is expected, or there will be action taken, and I said, I'm doing the best I can.

Q. Okay.

He says there's going to be action taken against -- against you, right?

A. Yes.

Q. And you're saying, I'm doing the best I can, is that right?

A. Yes.

In this connection, the district court commented: "Tullis' complaint as to Perkins' productivity is a remarkable downgrading in comparison to former written evaluations made while plaintiff was working on the shot blast." This comment ignores the fact that, as plaintiff herself recognized, there can

be no direct measurement of shot blast production. Thus, there can be no meaningful "comparison" between production of a shot blast operator and production of a burrer. Moreover, the performance evaluation of Perkins as a shot blaster on March 3, 1976, shows a "below average" rating as to quantity and quality of work produced, "below average" as to safety and "unacceptable" in the other two categories. The "downgrading"of her burrer production by Tullis would not appear to merit description as "remarkable".

Since she was not discharged for lack of productivity as a jeep driver or shot blaster, it seems irrelevant whether Perkins was "qualified" for those jobs or not. The evidence for plaintiff shows, however, that she was not qualified for those jobs. It may be noted in this connection that within a short period as a jeep driver Perkins was involved first in an accident and next in complaints of her fast and reckless driving.

She described the accident (T 37-38) as involving charges of "driving reckless" and that "there was this crash, and these lockers got all messed up". She denied that the accident was her fault and there were no sanctions. As to the later charges of fast and reckless driving, the district court commented that these were "uncorroborated complaints of two persons". It could be said that if two persons complained, each corroborated the other. In fact, it would appear from the evidence that more than two persons complained. The Caterpillar Safety Investigator reported that "he had received complaints from employees" (Ex. 1) and separately "the Union Safety Sub-Committeeman . . . complained about the jeep operator" (Ex. 1).

The evidence for plaintiff showed that as a burrer Perkins burred 3 cases per 8 hour shift as against an expected burring of 9 to 12 cases per shift, which was the actual performance rate of the woman then doing the

burring on the first shift. In the face of this evidence, the finding of the district court, that Perkins was "qualified" as a burrer and performed as such "within an average range" and "sufficient to meet the standard required", seems in error.

6.

The district court attached "utmost importance" to the "lawsuit" as a result of which Perkins was employed by Caterpillar on March 21, 1975. The "lawsuit" was found to be "an apparent, overt, discriminatory motive" for her discharge some fifteen months thereafter.

We believe that this finding by the district court represents an error of law and is also, on the evidence for plaintiff, an error of fact. We have not found any decision on facts such as those here but we are satisfied that our conclusion is correct in principle.

There was no "lawsuit". As a result of "informal methods of conference, conciliation, and persuasion" (42 U.S.C. § 2000e-5(b)) EEOC was able to secure voluntarily from Caterpillar "a conciliation agreement acceptable to the Commission" (42 U.S.C. § 2000e-5(f)(1) which was executed by Perkins, EEOC, and Caterpillar and under which Perkins secured her employment.

The goal of the EEOC Act is to eliminate discrimination. "co-operation and voluntary compliance were selected [by Congress] as the preferred means for achieving this goal." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). To this end, it was specifically provided in the EEOC Act: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." (42 U.S.C. § 2000e-5(b)) Violation of this provision was at the same time made a criminal offense.

Certainly Caterpillar is one of the "persons concerned". Not only was there no "written consent" of Caterpillar but its counsel objected to the admission of the conciliation agreement in evidence (T 3). The agreement was received in evidence over the objection. In this, we believe the court below was in error. Not only was admission of the evidence a violation of the quoted provision, but it was contrary to the basic policy and purpose of the EEOC Act to encourage voluntary compliance and the making of conciliation agreements. To infer a discriminatory motive from the making of a voluntary conciliation agreement to hire Perkins is not merely illogical but, by penalizing Caterpillar for doing what the EEOC Act encourages, is contrary to the policy adopted by Congress. This policy consideration was noted in an EEOC Act case in this fashion:

"The appellant was hired as an electrician as part of an infomal affirmative action program such as was recently approved by the Supreme Court . . . . We chose not to dampen the enthusiasm of employers to do that which defendant did herein when it hired appellant." Hamilton v. General Motors Corp., 606 F. 2d 576, 580-81 (5th Cir. 1979), cert. denied, 447 U.S. 907 (1980).

In connection with the conciliation agreement the district court found that "each of plaintiff's supervisors were [so in original] aware of this lawsuit [that is, the EEOC conciliation agreement] before she worked under their supervision. Plaintiff's first two supervisors, Saffer and McNeely, were informed of the lawsuit on the first day of her employment with Caterpillar. Other later supervisors each testified that they had knowledge of the original circumstances of her employment at the time that she worked under their supervision."

There was no evidence offered for Perkins which would support this finding. There is no metnion in her employment file of the conciliation agreement. Perkins testified that "people knew how I was hired" (T 60), and that "four months after my employment . . . Max McNeely and Larry Saffer told me . . . that they had been briefed by it, of how I was hired . . ."(T 61). Who "briefed" them and whether that person had any connection with Caterpillar are not made to appear.

The district court mistakenly believed that "later supervisors each testified that they had knowledge of the original circumstances of her employment". We are unable to find such testimony.

The persons at Caterpillar who participated who participated in the discharge of Perkins were Tullis, Morthland, Manion, Sauers, and Crowe. There is no testimony of other evidence that any of these persons had any knowledge how Perkins got her job. Tullis,

Morthland and Manion testified; they did not testify that they had such knowledge.

Supervisors Gilbert, Tracy, and Marquis testified; none testified that they had such knowledge.

Supervisor McNeely testified that when Perkins "hired in", a superintendent (Robbins, who seems to have figured not at all in the work record of Perkins) told him that Perkins "had got her employment with Caterpillar by a lawsuit" but nothing more and that he had never discussed this with anybody else (T 197).

Supervisor Tanzyus testified that some member of "management" said somthing to him "about how Miss Perkins might have obtained her employment" (T 209).

Supervisor Massey testified that in December 1975 Perkins told him that "she had to go through a court, sue the company to get her job" and that his response was that he "wasn't aware of it" (T 238).

Supervisor Mendenhall testified that when he was trying to get her production increased and her bad work habits eliminated she told him, "I got my job by going to Court at Caterpillar" and that he responded that this "doesn't make [her] any different. All I care about you doing this job that you're assigned to do right now" (T 262-63).

In light of the testimony summarized above, the description by the district court seems erroneous.

As to the principal "acts of sexual discrimination" which occurred "during the period of plaintiff's employment", the district court detailed "sexual advances" said to have been made to Perkins by "her two immediate supervisors", a reference to Saffer (who died in 1976) and McNeely (who testified at trial). Relief was not granted by the district court on any theory that the "sexual advances" were themselves violations of Title VII. The theory of the district court

was that refusal of sexual favors to Saffer and McNeely resulted in "degradations" on her "work record" and that a poor work record in turn caused Perkins to be discharged. The evidence establishes that this theory and the findings made to sustain it are mistaken. The discussion of the sex angle by the district court seems to exaggerate what little is in the record, and that little to have been without substance or significance.

McNeely is not shown to have had any supervisory contacts or experiences with Perkins. Neither Saffer nor McNeely had anything to do with Perkins, so far as the record discloses, after October 6, 1975. Neither had anything to do with her discharge. There is no suggestion that any of the many other Caterpillar supervisors or superintendents, including those who acted with reference to her discharge, ever made any sexual advances to Perkins.

The legal consequences under Title VII of "sexual advances" by male supervisory employees to female employees are not agreed upon in the reported decisions. Among other differences of opinion is that as to whether liability of the employer requires a showing of an employer policy or acquiescence in a practice of encouraging submission by female employees to the sexual advances of their male supervisors. Some of the decisions noted in our research are Miller v. Bank of America, 600 F. 2d 211 (9th Cir. 1979), Williams v. Bell, 587 F 2d 1240 (D.C. Cir. 1978), Garber v. Sexon Business Products, Inc., 552 F. 2d 1032 (4th Cir. 1977), Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977), Ludington v. Sambo's Restaurants, Inc., 474 F. Supp. 480 (E.D. Wis. 1979), Corne v. Bausch and Lomb, Inc., 390 F. Supp. 161 (D. Ariz. 1975), vacated and remanded without explanation, 562 F. 2d 55 (9th Cir. 1977).

We are not required in the circumstances of this appeal to resolve the differences found.

Assuming that Saffer and McNeely did make sexual advances to Perkins, there is no evidence that such advances had anything to do with her discharge. McNeely made no comment or notation about Perkins in her employment file, either as "degradations" of her or otherwise. Perkins herself testified (T 23) that before she left the supervision of Saffer (on October 6, 1975) she had "had no difficulty with the company". Saffer made one comment on September 19, 1975, which might be considered negative but this had no significance since there were many other and later reports in the employment file which established that Perkins was an unsatisfactory employee.

The district court nevertheless attached great importance to "sexual advances" made to Perkins by her "two immediate supervisors", referring to Saffer and McNeely. The finding

of the court was in this respect as follows:

> [A]fter plaintiff expressed a desire to advance to another job or to be accepted in a training program, her two immediate supervisors appeared, uninvited and intoxicated, at her home late at night on two separate occasions. During the first incident, they barged into the home, using crude language and attempting to induce plaintiff to engage in sexual relations with them. During a second episode, the two men identified themselves, and then attempted to break in through a window. Both incidents were witnessed by Perkins' roommate. The connection between the ongoing frequent discussions of advancement with her two supervisors and the sexual advances made by them were made clear to plaintiff by their words and their actions. Plaintiff was acutely aware that her submission was required for advancement. The lack of any direct statement which was overheard by others that Perkins' advancement depended on her willingness to gratify the sexual desires of her supervisors does not detract from the strong inferences provided by the circumstances.

The testimony of Perkins does not support this finding, nor any other evidence offered for her.

On the contrary, the evidence shows that

Saffer made no sexual advances to Perkins and that McNeely's conduct was mild and harmless.

The time of the visits of Saffer and McNeely to the home of Perkins is of significance; Perkins fixes the time of the first visit at just before her probationary period was up (T 10). The employment record shows that the probationary period was 30 days of work and that a report of the supervisor is due on the 31st day of work. This means that the probationary period for Perkins ended on April 24, 1975, and a report from Saffer was due on April 25. Thus, the first visit, according to Perkins, was sometime before April 24, 1975. The second visit, according to her (T 13), was not more than a month later: "I would say, and this wouldn't be exact, say a month, if that. It possibly wouldn't even have been that later." Thus, the second visit, according to Perkins, was sometime well before May 24.

There was nothing in the testimony of Perkins or in any other evidence which made any connection, or even suggested that there was any possible connection, between the visits of Saffer and McNeely and a desire expressed by her "to advance to another job or to be accepted in a training program". The first visit was during her probationary period. The second was well within a month thereafter. It does not seem reasonable for Perkins to be asking for advancement or training before she even knows that she will survive probation or within a short time afterwards. There is no evidence that she did it.

The testimony by Perkins about the first visit bears no resemblance to the finding of the court below and it may be that the court confused the two visits. In any event, Perkins testified that on the first visit she saw Saffer and McNeely in front of her house, that they had "been drinking",

that they went to the rear of the apartment and "tried to take out the bathroom window", that her roommate called out to them, that they asked to come in, that the roommate said no, that "they finally left because it was obvious that they weren't going to be getting in", and that she (Perkins) did not have any talk with them on the first visit (T 10-12).

Perkins testified that on the second visit, a man had brought her home from work late at night; that while her companion was still there, four men drove up in a van with beer; that Saffer and McNeely were two of the four; that the four "barged" into her apartment; that McNeely said if she went to bed with him he would stop the rumor at the factory that she was homosexual; that Saffer "passed out on a bed for a short time"; and that they all left after "I would say an hour, maybe two possibly." She testified to nothing about any "crude language" by

anyone and nothing about any "sexual advances" by Saffer at anytime (T 12-15).

The following excerpt from the testimony of Perkins (T 20) shows how mistaken was the finding made below:

> Q. Did he [McNeely] ever have any conversations with you about having sex other than to dispel the rumors about homosexuality?
>
> A. No
>
> Q. Did Larry Saffer have any conversations with you about having sex with either he or Max [McNeely] as a reward for -- as a reward for that you would be given better or preferential treatment?
>
> A. No.

The district court found that Saffer wrote good reports about Perkins until he and McNeely learned, on the first two visits to her house, that she "made it very clear that she would have nothing to do socially with either of the two supervisors." The district court mistakenly believed that Saffer's September 19, 1975, report was the first filed after the first

two visits to her house. However, the favorable Saffer April 28, 1975 report was made after the first visit and the favorable Saffer May 23, 1975 report was made after the first visits. It bears repeating that, according to the testimony of Perkins, Saffer never made any sexual advances or suggestions to her at any time.

Moreover, there was testimony by Perkins of a third visit by Saffer - not mentioned by the district court - which makes it all the more unlikely that Perkins ever "made it very clear that she would have nothing to do socially with the two supervisors", as the district court found. Perkins testified (T 16) that shortly before she changed on October 6, 1975 to the third shift, Saffer came to her house alone very early in the morning, "it was just getting daylight", dawn; and that he made no requests for sex but was explaining about possibilities of promotion at Caterpillar. If Perkins had

made it so "clear" that she would not see Saffer "socially", it seems strange indeed that she would be receiving him at dawn and listening to his explanations as to her possibilities of promotion.

It is also to be noted that Perkins never complained to the Caterpillar management about any "advances" by Saffer nor McNeely nor did she make use of the union grievance procedure, as she did as to many other matters. It is evident that at the time there was nothing in the conduct of either man to which she took any exception.

8.

To show disparate treatment of Perkins, her counsel called one employee of Caterpillar, a male named Ditzler. He was asked if he noticed "any particular instances where she was treated differently than the male employees" (T 131). This certainly invited proof of the sharp discrimination against Perkins as a female claimed to have been

shown by Caterpillar.

The first and chief example to which Ditzler testified was that on one occasion Supervisor Gilbert refused to give Perkins a paycheck while she was away from her work area. Gilbert came with paychecks to the witness and another male employee who were talking to Perkins. The witness was in his work area and was given his paycheck. Gilbert told Perkins he would give her the paycheck when she returned to her work area, and apparently did so. He gave a paycheck to the other male who was "farther away" from his work area than was Perkins. This was the discrimination. The record shows, however, that Gilbert had been admonishing Perkins frequently about her many absences and her tardiness caused by oversleeping. He had issued a warning notice to her. There is no evidence that the male had any such work delinquencies. The "discrimination"

seems well within the discretion of a supervisor and in any event minuscule in its effect on Perkins.

Other attempts to secure testimony as to discrimination from Ditzler were even less successful. As an example of discrimination, he testified that Supervisor Gilbert told Perkins she should wear safety shoes whereas he (the witness) was never told this. Rather than discrimination, this would seem to demonstrate a concern for the welfare of Perkins, especially when the employment file shows that in her early weeks she received an injury to her foot when a transmission case fell on her toe. The witness was then asked (T 134) if he had ever "heard attributed to any foreman that they did not want women working in that area". His reply was: "I have never heard a foreman." The witness was asked (T 139) as to Perkins if he had noticed at work "anything unusual about her one way or the other".

His reply was: "I never paid that much attention."

The "over-supervision of foreman Marquis" to which the district court refers is based entirely on the testimony of Perkins herself. There is no evidence that Perkins was the only female in her work area, as the district court supposed. Perkins herself testified (T 127) that there were six or eight other women there. If Marquis did watch her more than others, however, there was a very good reason for it. The employment file, which presumably a supervisor would consult, shows that just before she came to Marquis, her then supervisor made a notation in the file: "Ms. Perkins requires close supervision."

The district court cites as another example of discriminatory acts the suspension of Perkins by Supervisor Tracy for reckless and fast driving of a jeep, for foul language, and for intoxication. In this, the district

court accepted the testimony of Perkins nearly five years after the event (and she testified (T 27) that her memory was "awful") against the contrary written report made in detail at the same time the incident occurred by a person who had knowledge and had no motive shown by the evidence to falsify. We can have no confidence in the correctness of this finding. We note that the district court apparently finds that Perkins was not intoxicated because Tracy "allowed her to drive home". We are unable to find any evidence as to how Perkins got home on the night in question and whether she drove herself or was driven. If Perkins was as innocent as the district court finds, it is difficult to understand why she and the Union would accept the suspension and the loss of pay involved rather than to contest the matter through the established grievance procedure.

The district court compared the employment file of Perkins with the similar files of "all employees who were fired at Caterpillar" while she was there. To the district court this comparison "clearly illustrates the discrimination encountered by Nancy Perkins". In our study of the same employment files, no evidence of discrimination has been found.

Perkins was discharged for "lack of efficiency" and for being an "undesirable employee". It was a part of the burden of Perkins to show prima facie that males who were similarly inefficient and undesirable were not fired. There was no such showing made nor even attempted. A comparison of the employment files in evidence does not disclose any such evidence. Perkins offered no evidence that there was any male employee with a record equivalent to hers. For all that appears, had a male performed as did

Perkins he would have been likewise discharged. As the district court noted: "No other employee was fired for nonproductivity."

The district court believed that it had in evidence the "files of all employees who were fired at Caterpillar during the time of plaintiff's employment (Plaintiff's Exhibits 1-21)". We are unable to find any evidence describing Exhibits 1-21. We do find a statement of counsel for plaintiff that "1 through 21 being personal history files of various employees of Caterpillar Tractor during the time of -- terminating during the time from March 21, 1975 through July 7, 1976" (T 2). We recognize that Exhibit 1 is the employment history of Perkins, but there is nothing to show that Exhibits 2-21 are the files of <u>all</u> those discharged at the Decatur plant between March 21, 1975 and July 7, 1976. The exhibits were received over the objection of Caterpillar and without any predicate being laid for their admission.

In any event, proving that males were discharged does not establish any prima facie case for Perkins. What she was required to show was that males whose performance was as bad as that of Perkins were not discharged.

Most of the discussion by the district court in its opinion concerned absenteeism. This was undoubtedly one of the many factors which in sum made Perkins an "undesirable employee". She was not discharged for absenteeism, however, and comparisons with males who were discharged for absenteeism seems to be a useless excuse.

The district court made a finding: "Other employees were fired for serious disciplinary problems such as belligerent attitudes, chronic alcoholism, physical threats made to supervisor, etc." We are unable to discover any evidence to support this finding except that there was one male discharged for intoxication. The

employment files offered for Perkins contained as to each person a form of "separation notice", with a number of computer coded reasons for the discharge and a blank line for use where the printed reasons were not applicable. There are two printed reasons, either of which could be used for absenteeism. One was "Rules violation (includes A.W.O.L.)"; the other was "unsatisfactory attendance".

The reasons shown in the evidence for Perkins as to the discharge of males by Caterpillar are as follows:

Absenteeism	18 employees (Exs. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20)
"Rules Violation" (intoxication)	1 employee (Ex. 4)
"Dishonesty"	1 employee (Ex. 21)

The district court made a finding: "Interestingly, the only other employee to be fired without a prior suspension for the type of conduct complained of was a male who stole company property". We understand this to be a finding that Perkins was discriminated against because, while she had been suspended for intoxication and insubordination and had been suspended for excessive work absences and tardiness, she had not been suspended for lack of efficiency or for being an undesirable employee - the reasons for her discharge. The district court seems to contrast this with the treatment of males who, it is said, were always suspended before the drastic sanction of discharge was applied, except for a male who stole company property. We doubt that, if the premise were true, Title VII would require so delicate a balance of equality. We need not address

the issue, however, because an examination of the employment files shows that there were many discharges of males for absenteeism without the antecedent suspension for absenteeism without any antecedent suspension for absenteeism. Examples are Tippit (Ex. 2), Hempstead (Ex. 5), Wooten (Ex. 6), Layfield (Ex. 7), Pease (Ex. 8), Nalefski (Ex. 9), Lawson (Ex. 11), Martinez (Ex. 15), Jacobs (Ex. 16), Rodman (Ex. 18), Smith (Ex. 19) and Hackney (Ex. 20). The premise on which the district court acted was thus without any support in the evidence.

10.

The employment history and the other evidence offered by Perkins do not show that the reasons given for her discharge were "merely pretexual" as the district court found. On the contrary, the evidence shows that Perkins was not qualified for the jobs to which she was assigned, that she was an undesirable employee, and that

there were strong, legitimate, and non-discriminatory reasons for her discharge.

Caterpillar at all times showed patience with Perkins and the many problems she created. The supervisors worked with her, advised her, instructed her, and, in the case of Tullis, designated an expert to work by her side during her shift to demonstrate how to improve her performance in burring transmission cases. Transfers requested by her from one shift to another and from one job to another were made wherever practicable. She was warned repeatedly that unless her performance improved, she would be discharged. There was no improvement. The immediate cause of her discharge was her inability or unwillingness to burr more than 3 transmission cases per 8 hour shift whereas the expected and average number of cases burred by other workers (including another woman) was 10 to 12 per 8 hour shift.

At all times Perkins was represented by the Union and there was an established procedure to deal with grievances. No grievance was ever pursued by Perkins during her employment, although the grievance procedure was several times initiated by her. It appears to have been believed by her and by the Union that the disciplinary actions were justified and would be upheld if grievances were pursued and arbitrations were had.

Aside from the grievance procedure, Perkins could have complained easily to Caterpillar higher management if she had felt that she was being subjected to unwelcome "sexual advances" and other mistreatment. Caterpillar has been made liable by the district court without its management being given an opportunity to investigate her complaints, much less correct them.

The employment history of Perkins is to be considered also in the context that

(as we are told in an EEOC determination annexed to the complaint) there were 5,109 workers at the Caterpillar plant, of whom 94% were male. This means that there were over 300 other women employed in the same plant with Perkins. That many more men were employed than women does not suggest sex discrimination. It more naturally suggests that heavy industrial manual labor - Caterpillar makes bulldozers and other earth moving equipment - is unattractive to women. In any event, there is no evidence that any of the over 300 other women were discharged by Caterpillar or had any trouble in their employment. Perkins herself testified (T 127, 128) that in her immediate area there were "six, seven, eight" women employed, that she did not notice that they had any trouble, and that she could not explain why they had no trouble and why she had so much trouble.

The operation on which Perkins was engaged was an assembly line of transmission cases. The effect of a poor performance by Perkins in the line was to delay everybody in the line and to diminish the production at the plant.

Title VII does not require that an employer be handicapped with an employee who is undesirable and whose production is far below average. On the slight showing made by Perkins, her action should have been dismissed at the close of her case.

REVERSED AND REMANDED WITH INSTRUCTIONS TO ENTER JUDGMENT FOR CATERPILLAR.

SWYGERT, Senior Circuit Judge, dissenting. I respectfully dissent from the decision of the majority. If our purpose was to conduct

a de novo review after reading the cold record, I might very well have agreed with the majority's conclusions. It is not our function, however, to reweigh the evidence or to substitute our own inferences for the permissible inferences drawn by the trial court based on its resolution of credibility questions, see Pollice v. Hartford Fire Insurance Co., 355 F. 2d 524, 526 (7th Cir. 1965); Daniel v. Hadley Memorial Hospital, 566 F. 2d 749, 756 (D.C. Cir. 1977); we may set aside the findings of the trial court only if they are clearly erroneous, Fed. R. Civ. P. 52(a).

Admittedly, this is a close case; conflicting evidence was presented by the parties at trial. In such a case, credibility of the witnesses becomes particularly important. Judge Ackerman had the opportunity to hear the testimony of the witnesses and to observe their demeanor, and he concluded that the plaintiff was discharged from her

employment in violation of Title VII. After carefully examining the record, I cannot conclude that his findings are clearly erroneous. According, I would affirm the judgment of the district court.

EXHIBIT B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

April 5, 1982

Before

Hon. Luther M. Swygert, Senior Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Inzer B. Wyatt, Senior District Judge*

NANCY D. PERKINS,

Plaintiff-Appellee,

No. 80-2737 vs.

CATERPILLAR TRACTOR CO.,

Defendant-Appellant.

Appeal from the United States District Court

for the Central District of Illinois

Springfield Division

No. 78 C 3102

J. Waldo Ackerman, Judge

* Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

SPRINGFIELD DIVISION

NANCY D. PERKINS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-3102
	)	
CATERPILLAR TRACTOR COMPANY,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Nancy D. Perkins has brought this action under the provisions of 42 U.S.C. § 2000e et seq., Title VII of the Civil Rights Act of 1964. Plaintiff alleges that throughout her term of employment with defendant, the Company engaged in a series of acts of discrimination towards her because of her female sex or because of a complaint against Caterpillar filed by her with the Equal Employment Opportunity Commission (E.E.O.C.) prior to her employment.

Plaintiff believes that her termination was the result of discriminatory treatment throughout her employment, which resulted in an unsatisfactory employment record. This record was the basis for her ultimate dismissal at Caterpillar. On September 18 and 19, 1980, the parties were present before this Court and a bench trial was held. Plaintiff and defendant have filed final argument briefs. The following written order shall constitute my findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a case involving racial discrimination in rehiring, the United States Supreme Court established the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964. Initially, the plaintiff must establish a prima facie case in a

Title VII action. The basic prima facie case as set forth in McDonnell Douglas at p. 802 is:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications he was rejected; and (iv) that, after his rejection the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

An additional element was added to the prima facie case by the holding in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The Supreme Court of the United States stated that proof of discriminatory motive must be shown in a disparate treatment case.

Where no discriminatory motive is apparent, however, such motive may be inferred from the difference in treatment. In Solo Cup Co. v. Federal Ins. Co., 619 F. 2d 1178, 1186 (7th Cir. 1980), the court held that in a disparate treatment case, proof of discriminatory motive is required. However, the court quoted Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, and concluded that where all legitimate reasons advanced by the employer have been eliminated, it may be inferred that the decision was based on an impermissible consideration.

Variations of the elements of the prima facie case as stated in McDonnell Douglas, supra, must also be established in discrimination cases involving termination of employment for discriminatory reasons. The court in Flowers v. Crouch Walker Corp., 552 F. 2d 1277 (7th Cir. 1977), modified the McDonnell Douglas elements for the factual situation involving termination of employment.

The plaintiff is required to show:

(1) that she was a member of a racial minority;

(2) that she was qualified for the job she was performing;

(3) that her performance was of sufficient quality to merit continued employment;

(4) that she was discharged; and,

(5) that her termination resulted from a discriminatory motivation on the part of her employer.

Motification of the first element of the prima facie case set forth in Flowers, id., is easily accomplished by means of stating the type of discrimination applicable to the factual situation. Title VII prohibits discrimination in employment on account of sex. Therefore, in a sex discrimination action, it is enough to show that the person is a member of the female sex.

After the plaintiff has established a prima facie case, defendant is required to articulate some legitimate, non-discriminatory reason for the plaintiff's rejection. McDonnell Douglas Corp. v. Green, supra at 802; Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

However, Title VII does not permit defendant to use plaintiff's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). Plaintiff may, therefore, demonstrate that the reasons advanced were a pretext, i.e. a coverup for a discriminatory decision by defendant. Plaintiff must show that, but for discrimination, she would have retained the job. McDonnell Douglas Corp. v. Green, supra at 804-05. Therefore, the ultimate burden of persuasion rests with plaintiff, who must convince the court by a preponderance of the evidence that she has been the victim of discrimination. Board of Trustees v.

Sweeney, 439 U.S. 243 (1978) at n.1.

Having fully delineated the nature and order of proof in any Title VII action, I now find it necessary to address legal problems presented in the instant case. First, counsel for the defendant continues to assert that this court lacks jurisdiction as to discriminatory acts which occurred prior to 180 day limitation period set forth in Section 706e of Title VII. Section 706e requires that a charge must be filed with the E.E.O.C. within 180 days after the alleged unlawful employment practice occurred. However, it is settled law that acts which occurred prior to the 180 day limitation period may be challenged where plaintiff is alleging a pattern of discrimination consisting of a series of acts. Dagars v. Gettysburg College, 446 F. Supp. 1178 (M.D. Penn. 1978); Pekete v. U.S. Steel Corp., 353 F. Supp. 1177 (W.D. Penn. 1973); Bartness v. Drewrys, 444 F. 2d 1186 (7th

Cir. 1971); Cox v. United States Gypsum, 409 F. 2d 289 (7th Cir. 1969). Therefore, this court does have jurisdiction under Title VII of each of the acts complained of from the date of Perkins' employment with Caterpillar.

A second legal problem peculiar to the facts of the sexual discrimination case now before this court is whether the discriminatory acts of lower level supervisory personnel may be imputed to the employer. The evidence presented at trial established that the acts of discrimination towards plaintiff were varied and continuing in nature. Many discriminatory acts complained of were the result of actions of lower-level supervisory personnel. These discriminatory acts then appeared as accumulated degradations on Perkins' work record, and resulted in her termination by higher-level supervisory personnel at a later date.

An employer is charged with Title VII violations occasioned by discriminatory practices of supervisory personnel. See, Barnes v. Costle, 561 F. 2d 983 (D.C. Cir. 1977); Young v. Southwestern Savings and Loan Association, 509 F. 2d 140 (5th Cir. 1975); DeGrace v. Rumsfeld, 614 F. 2d 796 (1st Cir. 1980). Even in the case where upper level management has exhibited lack of discriminatory motivation, the employer is liable for discrimination by lower level supervisory personnel. Anderson v. Methodist Evangelical Hospital, Inc., 464 F. 2d 723 (6th Cir. 1972).

The evidence presented to this court by the parties is diametrically in opposition. However, based upon careful examination of the facts and careful observation of the demeanor of the witnesses at trial, it is my opinion that the plaintiff both established a prima facie case of sexual discrimination, and proved by a preponderance of the evidence

that the defendant's reasons for her dismissal were pretextuous.

Plaintiff, a woman, worked in the factory of defendant in various jobs. She ran the shot blast, a machine which cleans rust from metal. She "burred," by operating a machine which removes filings from the holes in metal. She also worked as a mobile equipment operator, driving a jeep. Perkins was qualified for each of these jobs.

It is my opinion that plaintiff did establish the third element of a prima facie case. Perkins did perform her work in a manner sufficient to retain her job, absent sexual discrimination. Plaintiff was not without fault as an employee. Her performance was within an average range, however, and at least sufficient to meet the standard required, "of sufficient quality to merit continued employment." Plaintiff's long pursuit of a much-desired job with Caterpillar, and her demeanor at trial

indicated to this court a strong desire to perform her job well. Much contradictory evidence was presented in the written reports of Perkins' supervisors as to the quality of plaintiff's work. However, for reasons to be explained hereafter, it is my opinion that defendant's contention of unsatisfactory performance by plaintiff was pretext.

The manner in which plaintiff secured her position with Caterpillar may provide the discriminatory motive which must be shown in a disparate treatment case. After seven years of unsuccessful attempt to gain employment with defendant corporation, Perkins filed a complaint with E.E.O.C. alleging sex discrimination. Plaintiff obtained her employment as a result of this suit. The lawsuit is of utmost importance factually, and I believe, provides an apparent, overt, discriminatory motive, where each of plaintiff's supervisors were aware of this

lawsuit before she worked under their supervision. Plaintiff's first two supervisors, Saffer and McNeely, were informed of the lawsuit on the first day of her employment with Caterpillar. Other later supervisors each testified that they had knowledge of the original circumstances of her employment at the time that she worked under their supervision.

Even if the manner in which plaintiff secured her employment with Caterpillar was not that rare specimen, overt discriminatory motive, plaintiff has shown inferred discriminatory motive. By a preponderance of the evidence, plaintiff has shown that the reasons advanced for her termination were not legitimate nor were they non-discriminatory. In Furnco Construction Corp. v. Waters, 438 U.S. 567, 577, the court explained: "[w]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons

for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration."

Defendant, Caterpillar, contends that plaintiff was dismissed because she was an "undesirable employee." The facts indicate, however, that the proffered reason was merely pretext. Clearly, acts of sexual discrimination occurred throughout the period of plaintiff's employment.

For instance, after plaintiff expressed a desire to advance to another job or to be accepted in a training program, her two immediate supervisors appeared, uninvited and intoxicated, at her home late at night on two separate occasions. During the first incident, they barged into the home, using crude language and attempting to induce plaintiff to engage in sexual relations

with them. During a second episode, the two men identified themselves, and then attempted to break in through a window. Both incidents were witnessed by Perkins' roommate. The connection between the ongoing frequent discussions of advancement with her two supervisors and the sexual advances made by them was made clear to plaintiff by their words and their actions. Plaintiff was acutely aware that her submission was required for advancement. The lack of any direct statement which was overheard by others that Perkins' advancement depended on her willingness to gratify the sexual desires of her supervisors does not detract from the strong inferences provided by the circumstances.

Plaintiff had no problems with management for several months. Plaintiff recalled no criticism as to the quality of her work or her attendance made to her at any time by her first supervisor, under whose super-

vision she worked for approximately six months. Written reports of April 28, 1975 and May 23, 1975, made by him indicated that she was a very satisfactory employee, and noted that her productivity was above 100 per cent. However, on September 19, the same supervisor filed a more negative report, complaining of "poor work habits and attendance" but still rating her job performance at 92.9 per cent. This report was the first report filed after plaintiff had made it very clear that she would have nothing to do socially with either of the two supervisors. Perkins was obviously unaware of these criticisms until the date of trial. A later written report by the same supervisor filed on October 6, 1975, indicated somewhat improved performance by Perkins.

Because of the sexual overtures made to her by these supervisors, plaintiff applied for and received a shift change.

Thereafter, she worked under foreman Marquis. Marquis watched her far more closely than he did other employees who worked under him, all male. Male co-workers working near Perkins were aware of his over-supervision as well and spoke with plaintiff about it. As he did with none of the other employees, all male, Marquis timed her visits to the restroom.

To escape the uncomfortable over-supervision of foreman Marquis, plaintiff applied for a transfer to another area where a Mr. Gilbert was the foreman. On the first day of her employment under his supervision, Mr. Gilbert talked with her about her "absentee problem." Notably, her former supervisor, Marquis, had no complaint whatsoever about her attendance, and her first supervisor had not spoken with her about any attendance "problem."

Several discriminatory incidents occurred under Gilbert's supervision. For instance, a co-employee testified that Gilbert handed paychecks to the two men with whom Perkins was having coffee, but required plaintiff to return to her work area in order to receive her paycheck. The male co-employee also testified that during the period of time when Perkins worked with him, general foreman Nelson was constantly watching the area, and that he had not done so prior to plaintiff being in the area and ceased doing so after plaintiff was transferred.

Plaintiff worked for a period of time driving a jeep under the supervision of Mr. Massey. Notably, at trial, Massey denied any problem with absenteeism while Perkins was working under his supervision. During this period of time, an incident occurred which resulted in the suspension of plaintiff for a period of four days. On the basis of the uncorroborated complain

of two persons that Perkins was driving her jeep recklessly and too fast, General Foreman Tracy stormed into the building where Perkins was making a delivery and chastized her. Perkins replied that she was merely doing her job, and in angry language containing expletives, she made it clear that she felt Tracy was merely harassing her. General Foreman Tracy subsequently suspended her for use of foul language, and for intoxication. However, it is notable that while Tracy claimed plaintiff was intoxicated, her allowed her to drive home. In addition, the language to which Mr. Tracy objected was used so commonly in the factory that it was termed "shop talk".

Perkins' transfer to the jeep job was discovered to be a mistake, and the job was given to a man with more seniority.

Contrary to company policy, Perkins was not placed in her former job as a shot blaster. Instead, plaintiff was "loaned out," working in several different areas, either running the shot blast or burring. One of her supervisors during this period was a Robert Mendenhall who, in a written report composed after Perkins had worked only three days for him, complained that she was away from her job too much and complained about her attendance.

Perkins' final foreman at Caterpillar was Tullis, who claimed she was not producing adequate quantities of burred goods in comparison to the amount of work produced during the day shift. Perkins, however, claimed that part of her time was spent re-doing the work of the day shift. Tullis' complaint as to Perkins' productivity is a remarkable downgrading in comparison to former written evaluations made while plaintiff was working on the shot blast.

While the downgrading is not so apparent as in Sherkow v. State of Wisconsin v. Department of Public Instruction, No. 79-2247 (7th Cir. Aug. 20, 1980), few complaints as to plaintiff's productivity had previously appeared in the written work reports.

Another incident which appeared on Perkins' work record occurred during the period of time when Perkins was working under the supervision of Tullis. Perkins left the work area to go to the ladies room. She was so physically ill that she was unable to return to work, and she asked another employee to inform her foreman, Tullis. Upon his appearance outside the ladies room, Tullis suspended her for the rest of the evening because she had not reported to the nurse, ignoring her protests that she was so ill that she was unable to report during that short time period.

Plaintiff was, during all periods of her employment, seeking admittance to any training program for a job opening on the first shift, a fact made known to each of her supervisors. An offer for a training program for a welders job open on both first and third shifts was made to plaintiff. However, this offer was communicated through Perkins' foreman, and she received information only as to the opening on third shift. As a result, she turned down the offer of training. The evidence established no other offers of training opportunities made available to plaintiff.

Examination of the personal history files of all employees who were fired at Caterpillar during the time of plaintiff's employment (Plaintiff's Exhibits 1-21) clearly illustrates the discrimination encountered by Nancy Perkins. Employees with far more absenteeism than plaintiff, each of them male, were not fired.

Some were, in spite of the excessive absences, promoted. Others with 60-80 absences in the period of a year were fired and subsequently reinstated. In fact, eleven of the twenty-one employees were fired for not reporting to their supervisors at all on days when they were absent. Perkins had somewhat less than 30 absences during a period of fifteen months and had not failed to report to her supervisor. Other employees were fired for serious disciplinary problems such as belligerent attitudes, chronic alcoholism, physical threats made to supervisor, etc. Interestingly, the only other employee to be fired without a prior suspension for the type of conduct complained of was a male who stole company property. He was reinstated; plaintiff was not reinstated. No other employee was fired for nonproductivity.

Perkins has established by a preponderance of the evidence that the reasons for her firing were pretextual. Plaintiff was not an "undesirable employee," but was, instead, the victim of sexual discrimination stemming from the complaint lodged with E.E.O.C. by which she acquired her job. Her employment record was studded with incidents which were the result of discrimination. Supervisors noted contradictory complaints. Some supervisors found her work productivity and quality adequate to excellent; others found productivity substantially below standard. Some supervisors were obsessed with her "attendance irregularities." However testimony at trial, although unclear, indicated that these included sick days, personal days, and lateness of more than five minutes. Thus, defendant failed to establish the extent of plaintiff's

"attendance irregularities," particularly in comparison to the attendance irregularities of other employees. Some of her supervisors criticized her for taking too long at break time; others made no mention of such problem. The only co-employee who testified stated that she took no longer at break time than any other employee. In conclusion, the demeanor of some supervisors at trial and their conflicting complaints about her work at Caterpillar strongly indicates that the record upon which plaintiff's termination was premised is replete with complaints and incidents which were, in fact, the result of sexual discrimination on the part of lower-level supervisory personnel.

Accordingly, I find that plaintiff has successfully established that the reasons set forth by defendant for Perkins' dismissal are merely pretextual, and that plaintiff has been the victim of unlawful discrimination. Relief is hereby granted to plaintiff under

the provisions of 42 U.S.C. 2000c et seq., Title VII of the Civil Rights Act of 1964 in an attempt by this court to make the plaintiff whole. See, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The defendant shall reinstate plaintiff to a position in its work force in the salary range and responsibility level of her position with Caterpillar at the date of her termination. In addition, expungement of plaintiff's employment record is ordered by this Court, in order to allow plaintiff a record sufficient to permit her to obtain employment elsewhere if she would desire to do so. See, Sherkow v. State of Wisconsin, supra. Monetary damages for plaintiff for back pay to the date of her instatement and reasonable attorney's fees are hereby ordered as well.

Enter this 7 day of November, 1980.

/s/ J. Waldo Ackerman

J. Waldo Ackerman

United States District Judge

EXHIBIT D

FED. RULES CIV. PROC. RULE 52(a), 28 U.S.C.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of facts and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or

memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).